No. 95-___

In The

# Supreme Court of the United States

October Term, 1995

THOMAS MASOTTO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether criminal liability for "using" and "carrying" a firearm, under 18 U.S.C. § 924(c)(1), may be predicated on the defendant being merely an aider and abettor or co-conspirator of the person who used and carried the firearm, without proof that the defendant knew of the intended use or was present when the offense was committed.

2. Whether, as the First, Second, Fifth and Eighth circuits hold, a court of appeals' harmless-error analysis can rescue the trial judge's failure to instruct the jury on an essential element of a racketeering offense, 18 U.S.C. § 1962(c), when there is no basis to conclude that the jury made findings that would support the omitted element, or whether the failure to instruct on an element is structural error, as the Sixth and Ninth circuits hold.

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## PETITION FOR A WRIT OF CERTIORARI

Thomas Masotto petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The court of appeals' opinion is reported at 73 F.3d 1233 (2d Cir. 1996), reprinted herein at Appendix, pages 1a-36a.

## JURISDICTION

The court of appeals' opinion affirming the conviction was issued on January 3, 1996. A timely petition for rehearing was denied on February 1, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**United States Constitution, Article III, Section 2**: "The trial of all crimes, except in cases of impeachment, shall be by jury."

**United States Constitution, Amendment 5**: "No person shall be . . . deprived of life, liberty, or property without due process of law."

**United States Constitution, Amendment 6**: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

**18 U.S.C. § 924(c)(1)**:

> Whoever, during and in relation to any crime of violence . . . (including a crime of violence . . . which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years. . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other terms of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried.

**18 U.S.C. § 1962(c)**:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.



## STATEMENT OF THE CASE

This case presents two important issues of federal criminal law, as to one of which the circuits are divided. The facts necessary to presenting these issues may be stated briefly:

### Overview of the Alleged Conspiracy

Thomas Masotto, a Freeport, New York, business owner with no criminal record, was convicted of participating in the affairs of an enterprise – namely, an informal criminal "crew" comprising individuals who committed numerous offenses – through a pattern of racketeering, 18 U.S.C. § 1962(c), and conspiracy to do so, 18 U.S.C. § 1962(d).[1] In addition, Mr. Masotto was convicted under 18 U.S.C. § 924(c)(1), based on someone else's use of a firearm during the robbery charged in Count 7.

The evidence showed that a "crew" of lawbreakers – Frank Scerbo, Peter Bertuglia, Joseph Lucas and Michael Varone [the "Witnesses"] – committed these crimes. The Witnesses, all with criminal records that began long before they met and befriended Mr. Masotto in 1991,

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[1] The predicate RICO acts were conspiracy to commit arson, destruction of government property, conspiracy to commit robbery, robbery (counts 6 & 7), conspiracy to steal from interstate shipment, theft from interstate shipment, conspiracy to make extortionate extensions of credit, conspiracy to use extortionate means to collect extensions of credit, conspiracy to commit credit card fraud, credit card fraud, and using and carrying a firearm during a crime of violence (Count 15).

acknowledged that Mr. Masotto did not directly commit any of the charged criminal acts.

The evidence was sharply in dispute as to Mr. Masotto's relationship to the Witnesses. Some of them described him as giving direction to the crew members, and as a "father figure." Other evidence portrayed Mr. Masotto as someone associated with the Witnesses who sometimes received indirect benefit from their criminal activity. Witness Lucas described Mr. Masotto as his "boss," while Varone said that Mr. Masotto never told him to hijack trucks and characterized Mr. Masotto as an "advisor." Mr. Masotto's trial theory was that he was merely an associate of the Witnesses, and did not knowingly and intentionally join with them in the commission of their crimes.

There is no dispute that the Witnesses committed many crimes in 1991 and 1992 without Mr. Masotto's advice, participation, or even knowledge. Further, the government's evidence established that the "crew" members themselves (including Lucas and Varone), besides committing crimes even the government acknowledged were not related to Mr. Masotto, were leaders of or were active in a host of criminal "crews," "mini-crews," and conspiracies *wholly separate* from Mr. Masotto and the "crew" Mr. Masotto was alleged to have "led."

**Mr. Masotto Did Not Use or Carry a Gun**

Count 15 charged Mr. Masotto with aiding and abetting the use and carrying of a firearm during and in relation to the hijacking of an All-Pro Air Delivery Service truck by the Witnesses. Although the government's



evidence (testimony from Scerbo and Lucas) indicated Mr. Masotto knew that, of the "crew" members, only Lucas at times carried a gun, there was no evidence Mr. Masotto knew that any weapons would be used in connection with the All-Pro hijacking. On the day of the hijacking, Lucas and David Amato, a member of Lucas's "crew," were in fact carrying guns. However, Lucas was not present at the hijacking; Amato alone, using his gun, committed the offense.

Apparently as part of its § 924(c) case, the government introduced evidence that Mr. Masotto received a firearm. Bertuglia testified that Mr. Masotto stated he wanted one or two firearms. Lucas testified that Mr. Masotto gave him money to obtain a firearm. Michael Marzilliano, a 30-year friend of Mr. Masotto, testified that Lucas brought Mr. Masotto a package presumably containing a gun, but there was no evidence the gun was used, fired, or even taken out of the box.

**Jury Not Instructed Under *Reves v. Ernst & Young*, 507 U.S. 170 (1993)**

The trial court was asked to instruct the jury that, in order to convict Mr. Masotto, it had to find that he "conducted, or participated in, the affairs of the enterprise by participating in the operations and management of the enterprise itself." The judge refused, and told the jury instead it needed to find only that "there was a meaningful connection between the unlawful or racketeering acts of the defendant and the affairs of the enterprise." This instructional omission is discussed in detail in point numbers II & III, below.

### Conviction, Sentence, Judgment

Mr. Masotto was sentenced to 248 months imprisonment: 188 months on counts 1, 2, 6, 7, 9, 11 & 12; 60 months on counts 3, 9, 13 & 15; and 120 months on counts 4, 5 & 10. The sentences imposed on all counts but Count 15 run concurrently; the sentence imposed on Count 15 runs consecutively. No fine was imposed.

## JURISDICTION OF THE LOWER COURTS

The District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Second Circuit had subject-matter and appellate jurisdiction pursuant to 18 U.S.C. § 1291.

## REASONS FOR GRANTING THE WRIT

### I. Section 924(c)(1) gives enhanced punishment to those who have personally used a firearm in committing a crime.

When a defendant commits a crime of violence while using or carrying a dangerous weapon, 18 U.S.C. § 924(c)(1) mandates a five-year sentence[2] consecutive to that imposed on the substantive – predicate – crime of

[2] The consecutive sentence can range as high as 30 years, depending on the type of dangerous weapon used in committing the predicate offense. In this case, the only evidence regarding Lucas's or Amato's weapon was that it was an unadorned handgun.



violence. Section 924(c)(1) functions uniquely as a sentence enhancement for weapons use by individuals.[3] This case squarely presents the issue whether § 924(c)(1) can be applied to someone who never used nor carried a firearm, nor who was present when a firearm was used and carried, but who aided and abetted or conspired with someone who used one.

In *Bailey v. United States*, 116 S. Ct. 501, 507, 509 (1995), this Court sharply limited § 924(c)(1)'s application to individuals whose "use" of a gun was merely passive:

> In § 924(c)(1), however, liability attaches only to cases of actual use, not intended use, as when an offender places a firearm with the intent to use it later if necessary. . . .
>
> . . . .
>
> The phrase "uses to commit" [in the original version of § 924(c)(1)] indicates that Congress originally intended to reach the situation where

[3] *See, e.g., Deal v. United States*, 113 S. Ct. 1993, 1997 (1993); *Busic v. United States*, 446 U.S. 398, 405 (1980); *see generally Busic*, 446 U.S. at 399-410; *see also Bailey v. United States*, 116 S. Ct. 501, 505 (1995) ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.' ") (brackets in original); *cf. Busic*, 446 U.S. at 416 (Stewart, J., dissenting) (describing § 924(c) as "[a] general enhancement provision – with its stiff sanctions for first offenders and even stiffer sanctions for recidivists"). Some circuits persist in treating § 924(c) as a substantive offense, contrary to what this Court has said. *See, e.g., United States v. Hill*, 971 F.2d 1461, 1464 & n.3 (10th Cir. 1992) (en banc); *United States v. Munoz-Fabela*, 896 F.2d 908, 910 (5th Cir.), *cert. denied*, 498 U.S. 824 (1990).

> the firearm was actively employed during commission of the crime. This original language would not have stretched so far as to cover a firearm that played no detectable role in the crime's commission.
>
> . . . .
>
> To sustain a conviction under the 'use' prong of § 924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime.

A conclusion extending liability to acts where a firearm is not disclosed or mentioned by the offender, the Court stated, "would distort the language of the statute." *Id.* at 508-09. Accordingly, "§ 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 505.

Prior to *Bailey*, the courts of appeals had largely endorsed the so-called "fortress theory" of § 924(c), which was grounded on actual or constructive possession and ownership or control – which equated to "use" under § 924(c)(1) – of firearms, irrespective of actual individual participation or knowledge of the weapons.[4] *Bailey* "reject[ed] the fortress theory of use." *United States v. Bingham*, 1996 WL 163028, at *4, No. 95-3006 *et al.* (6th Cir.

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[4] *See, e.g., United States v. Archer*, 1992 WL 308852, Nos. 91-3215 & 91-3216 (D.C. Cir. Oct. 6, 1992) (unpublished; citing cases); *United States v. Wight*, 968 F.2d 1393, 1396 (1st Cir. 1992); *United States v. Curry*, 911 F.2d 72, 80 (8th Cir. 1990), *cert. denied*, 498 U.S. 1094 (1990); *United States v. Henry*, 878 F.2d 937, 944 (6th Cir. 1989); *United States v. Grant*, 545 F.2d 1309, 1312-13 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).



Apr. 9, 1996); *accord United States v. Ramirez-Ferrer*, 1996 WL 125595, at *3-4, No. 94-1018 (1st Cir. Mar. 27, 1996); *see Bailey*, 116 S. Ct. at 505-09.

The question arises: Did *Bailey*'s rejection of the fortress theory necessarily include rejection of vicarious liability under § 924(c)(1)? *Bailey*'s rejection undermines the theory's underlying premise of "constructive," or "group," § 924(c) liability based on who is in the fortress and who controls or owns the fortress and weapons inside.

As they did pre-*Bailey* and as the Second Circuit did in *Masotto*, the circuit courts of appeals post-*Bailey* have continued to hold routinely that a defendant may be found guilty of violating § 924(c) either on an aiding-and-abetting or a *Pinkerton*[5] theory.[6] Unlike the federal district

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[5] *Pinkerton v. United States*, 328 U.S. 640 (1946).

[6] *See, e.g., United States v. Spring*, 1986 WL 148539, at *17, No. 94-4262 (10th Cir. Apr. 2, 1996) (remanding in light of *Bailey*: "The jury instruction did not focus the jury's attention on the elements of the 'carry' prong of § 924(c)(1), and we cannot say with certainty that a properly and fully instructed jury would have found Mr. Spring guilty of aiding and abetting in the carrying of a firearm."); *United States v. Price*, 76 F.3d 526, 529 (3d Cir. 1996) (rejecting defendant's argument that aiding-and-abetting liability is inapplicable to § 924(c) charge, and holding: "It appears that no case in the Third Circuit has considered a conviction for violation of [§ 924(c)] on an 'aiding and abetting' theory. We see no reason, however, why we should rule differently from every other circuit in the country, and our own district courts. . . . "); *United States v. Giraldo*, 1996 WL 138522, at *7 (2d Cir. Mar. 25, 1996) (stating that if firearm were carried by or within reach of one defendant but not another, "that other defendant may be found liable for carrying the gun either on a

court in *United States v. Foreman*, 914 F. Supp. 385 (C.D. Cal. 1996), the circuit courts of appeals have not questioned how *Bailey* limits vicarious liability, either through aiding-and-abetting or conspiracy theories.

In *Foreman*, the court noted that *Bailey*, "by defining 'use' according to its plain meaning, entirely strips away all the judicial 'gloss' that has expanded liability under § 924(c). *Bailey* now limits liability almost entirely to those who personally 'use' or 'carry' a firearm." 914 F. Supp. at 385. Accordingly, the court rejected the government's request for an instruction on § 924(c)(1) aiding-and-abetting and conspiracy liability:

> The court should only give an aiding and abetting instruction on a § 924(c) count when the government charges that the defendant aided and abetted the specific acts that fall within the literal definitions of "use" and "carry.". . . .
>
> . . . .
>
> A charge of conspiracy to violate § 924(c) would fail for the same reasons. . . . Just as the government must prove that an aider and abetter under § 924(c) aided or abetted the specific 'use' or 'carrying' of a firearm, the government must prove that a defendant agreed to the specific

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*Pinkerton* theory, or on an aiding-and-abetting theory") (citations omitted); *United States v. Monroe*, 73 F.3d 129, 132 (7th Cir. 1995) (post-*Bailey* decision noting that coconspirator charged under § 924(c) "is liable for the acts of coconspirators in furtherance of the conspiracy, including violations of [§ 924(c)]").



> 'use' or 'carrying' of a firearm before an instruction for conspiracy under § 924(c) is appropriate. The agreement to participate in an armed robbery cannot double as the agreement to 'use' or 'carry' a gun. . . .
>
> *Bailey clarifies that the purpose of § 924(c) is to single out the actual user or carrier of a gun during a violent crime.* This person is deemed more culpable for the gun offense, and the added violence that flows from using or carrying a gun.

914 F. Supp. at 387-88 (emphasis supplied); *but see United States v. Tang*, 76 F.3d 390, 1996 WL 43500, at *2-3 (9th Cir. Feb. 12, 1996) (unpublished decision) (approving *Pinkerton* liability; no discussion of *Bailey*).

The reasoning in *Foreman* makes sense. Enhancement under § 924(c)(1) should be married to the notion that a defendant for whom vicarious § 924(c)(1) enhancement is sought must be at least as "active" in the use or carrying of a firearm in the predicate offense as was the actual user or carrier. A sentence enhancer that imposes significant consecutive punishment ought to be grounded on more than vicarious "use" without knowledge of the actual user or carrier's intent to make "active" use of a firearm.

The purpose of § 924(c)(1) was to punish more severely, and thereby deter, individuals who have introduced greater danger to life by the use or carrying of firearms than would otherwise be the case in a crime of violence. *See Deal*, 113 S. Ct. at 1998. The language of § 924(c)(1) itself recognizes the need to define the individualizing characteristics of the offenders it seeks to target: they must have sought to "dramatically heighten[ ] the

danger to society," *Smith v. United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotations omitted), by introducing a deadly weapon into an already violent crime.

The problem with conspiratorial and aiding-and-abetting § 924(c)(1) liability is illustrated here. Mr. Masotto's § 924(c)(1) *Pinkerton* liability was founded on the notion that he could have "reasonably foreseen" the use of a weapon in the hijacking. His § 924(c)(1) aiding-and-abetting liability was founded on the government's contention that he facilitated the use or carrying of a gun in the hijacking. The government's evidence, however, did not show Mr. Masotto knew that Amato, who solely carried out the hijacking, either had a gun or that he intended to use it in the hijacking.

Whether § 924(c)(1) vicarious liability is based on aiding and abetting or conspiracy, it fails to consider the "dangerousness" of the defendant who neither carried nor used any weapon. In such a case, the point of § 924(c)(1) is lost: when a defendant has no knowledge of, or intention to introduce, a firearm into a crime of violence solely committed by a codefendant, the § 924(c)(1) sanction does nothing to "deter" her and strays from "the need for individualized sentencing," *Witte v. United States*, 115 S. Ct. 2199, 2205 (1995).

Vicarious liability thus fails to recognize *Bailey*'s underlying assumption that § 924(c)(1) is intended to identify individuals prone to committing uniquely death-conducive crimes and singularly to deter and punish them. This intent cuts against the grain of *Pinkerton*, which imposes liability on the basis of foreseeability. And it is inconsistent with 18 U.S.C. § 2 and its objective of



unifying the common law concepts of principals in degree and accessories before the fact, *see United States v. Tobon-Builes*, 706 F.2d 1092, 1099-1100 (11th Cir. 1983); *United States v. Molina*, 581 F.2d 56, 61 n.8 (2d Cir. 1978).

*Bailey* suggests such individualization is the goal of § 924(c). That is why it requires "active" use. Lack of knowledge about the existence or intended use or carrying of a weapon is passive and "inert," 116 S. Ct. at 508. In this sense, the unknown weapon may just as well be "locked in a footlocker in a bedroom closet" or "inside a bag in [a] locked car trunk," *id.* at 509. As *Bailey* suggests, when the offender neither discloses nor "mentions" the gun to the codefendant, *id.* at 508, for purposes of determining the codefendant's liability "the presence or involvement" of the gun in the crime of violence could only be considered "the result of accident[,] coincidence," or "happenstance," *Smith*, 113 S. Ct. at 2059.

While *Bailey* holds that a conviction under § 924(c)(1) must be premised on the abrogation of "constructive" liability and the actual, personal conduct of the defendant, the courts have continued to permit another kind of constructive liability – vicarious liability – that ignores the defendant's actual conduct. Because of this inconsistency and because firearms charges under § 924(c) "are a staple of federal court jurisprudence,"[7] this Court should grant certiorari review to consider the viability of vicarious liability after *Bailey*.

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[7] *United States v. Baker*, 78 F.3d 1241, 1243 (7th Cir. 1996).

## II. The courts of appeals and state courts are in disarray and disagreement on whether failure to instruct on an offense element can be harmless error.

In *Reves v. Ernst & Young*, 507 U.S. 170, 178, 184 (1993), this Court held that one element of the offense defined in 18 U.S.C. § 1962(c) is that the defendant "participate in the operation or management of the enterprise itself," or "have some part in directing the enterprise's affairs." This degree of participation sets a mere advisor or consultant – like the accounting firm in *Reves* – apart from those with a more direct rôle.

The trial judge in this case permitted the jury to convict based only on a showing that the defendant's unlawful acts "in some way related to the activities of the enterprise" or that the defendant "was able to commit the acts solely by virtue of his position or involvement in the enterprise."

The court of appeals recognized that the trial judge erred, but it held the error harmless. In so holding, the court of appeals made its own judgment that the evidence showed management or direction. There was no basis in the jury's verdict to make such a finding. Thus, the issue is presented clearly: Can a reviewing court make a finding on an offense element without the jury having necessarily found facts that support such a conclusion?

This Court has never directly said whether the trial court's failure to instruct on an essential offense element can be the subject of harmless-error analysis. Such a failure may consist of entirely omitting an element instruction or, as here, phrasing an instruction so as to prevent a jury finding on the element.



This Court has often discussed harmless-error analysis in the context of instructions claimed to violate the Constitution. But from these discussions, the courts of appeals have been unable to draw a consistent rule applicable to instructional error affecting an element of the charged offense.

The federal courts' holdings span the spectrum and, as the Eighth Circuit remarked, "there is not a clearly preferred answer to the question of whether the failure to instruct on an essential element of the crime charged may be considered harmless error," *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168, 176-77 (6th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987). The Sixth and Ninth circuit courts of appeals hold that element-omitted instructions can never constitute harmless error and are reversible error *per se*.[8] The First, Fifth and Eighth circuits have held

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[8] *See, e.g., Harmon v. Marshall*, 69 F.3d 963, 965-66 (9th Cir. 1995) ("we have held that omitting instruction on, or otherwise failing to submit to the jury, one element of an offense is reversible *per se*"); *United States v. Hove*, 52 F.3d 233, 236 (9th Cir. 1995) (holding that trial court's omission of "essential" willfulness element of currency structuring "is plain and cannot be harmless") (citing cases); *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994) (" 'If jury instructions omit an element of the offense, constitutional error results because the jury has been precluded from finding each fact necessary to convict a defendant.' Such an error cannot be harmless. . . . The harmless error analysis is incapable of being applied here.") (citation omitted; quoting *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir. 1991)), *cert. denied*, 115 S. Ct. 1170 (1995); *Hoover*, 802 F.2d at 177-78 (recognizing split among circuits and holding that "the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the *Chapman* [*v. California*, 386 U.S. 18 (1967)] harmless error analysis does not apply.").

that element-omitted instructions may constitute harmless error under certain circumstances.[9] The circuit courts' difficulty in resolving the issue is reflected in the decisions of the Second Circuit.[10] The states are also in

[9] *See, e.g., United States v. DeMasi*, 40 F.3d 1306, 1317-18 (1st Cir. 1994) (rejecting argument that trial court's failure to give "reasonably foreseeable" language in *Pinkerton* instruction was equivalent to unconstitutional directed verdict in government's favor, and applying harmless-error analysis as discussed in Justice Scalia's concurrence in *Carella v. California*, 491 U.S. 263 (1989)), *cert. denied sub nom. Bonasia v. United States*, 115 S. Ct. 947 (1995); *Redding v. Benson*, 739 F.2d 1360, 1363-64 (8th Cir. 1984) (rejecting argument that state trial court's failure to instruct on material element of attempted theft could not constitute harmless error, and holding that the error was "harmless beyond a reasonable doubt"), *cert. denied*, 469 U.S. 1222 (1985); *United States v. Jobe*, 77 F.3d 1461, 1475-76 (5th Cir. 1996) (upholding bank fraud conviction on plain error review notwithstanding trial judge's failure to instruct jury on the materiality element of the offense); *United States v. Brown*, 616 F.2d 844, 846 (5th Cir. 1980) ("Dicta to the contrary notwithstanding . . . we divine no rule that failure to specifically instruct on any single essential element of a crime *per se* constitutes plain error.") (citations omitted).

[10] *Compare United States v. Masotto*, 73 F.3d 1233, 1239 (2d Cir. 1996) (applying harmless-error analysis to element-omitted instruction) *with United States v. Rogers*, 9 F.3d 1025, 1032 (2d Cir. 1993) (element-omitted instruction violated defendant's sixth amendment right to counsel and constituted "structural error" in trial process: " 'The [sixth amendment right to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." ' ") (quoting *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2080 (1993)) (brackets in *Rogers*), *cert. denied*, 115 S. Ct. 95 (1994); *see generally United States v. Smith*, 939 F.2d 9, 10-11 (2d Cir. 1991) (question whether element-omitted instruction requires automatic reversal or is subject to harmless error "is a close one").



conflict in their approach to the problem of element-omitted instructions.[11]

## III. Omitting an offense element is a structural defect under this Court's cases because the jury is not given a chance to make a finding that the Constitution vouchsafes to it; a reviewing Court cannot substitute its judgment for the jury's.

It is commonplace that some constitutional errors cannot be treated as harmless. These include the right to

[11] *See, e.g., State v. White*, 543 N.W.2d 725, 730-31 (Neb. 1996) (relying on United States Supreme Court and federal cases "for the purpose of guidance in interpreting our own Constitution" and holding that trial court's failure to instruct on essential element mandates *per se* reversal: "We conclude that where the jury has not been instructed as to a material element of a crime, there is no verdict within the meaning of [the Nebraska Constitution]. Consequently, there is here no object on which harmless error analysis can operate."); *State v. Brown*, 647 A.2d 17, 24 (Conn. Ct. App.) (holding that failure to instruct on essential element of robbery cannot constitute harmless error), *certif. denied*, 649 A.2d 254 (Conn. 1994); *People v. Vaughn*, 524 N.W.2d 217, 227 & n.16 (Mich. 1994) (rejecting "automatic reversal rule" for element-omitted instructions and holding that harmless-error may be used); *People v. Cain*, 892 P.2d 124, 1250 (Cal. 1995) (same), *cert. denied*, 116 S. Ct. 783 (1996); *Jarrel v. State*, 413 S.E.2d 710, 713 (Ga. 1992) (holding that death penalty must be reversed where trial court omitted essential element of statutory aggravating factor) (quoting *Black v. State*, 410 S.E.2d 740, 746 (Ga. 1991), *cert. denied*, 506 U.S. 839 (1992)); *State v. James*, 1995 WL 548788, at *3-4, No. 03C01-9408-CV-00276 (Tenn. Crim. Ct. App. Sept. 18, 1995) (holding that trial court's failure to instruct on essential element of robbery was not subject to harmless-error analysis).

an impartial judge, the right to counsel, race-based exclusion from the grand jury, the right to self-representation, and the right to a public trial. *Arizona v. Fulminante*, 499 U.S. 279, 311 (1991).

Such errors are "structural." They affect "the framework within which the trial proceeds." *Id.* at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

Among these structural errors are those that undercut the jury's exclusive function as factfinder, beyond a reasonable doubt. *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2080-81 (1993). As this Court explained in *Sullivan*,

> What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. . . .
>
> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

*Id.* (citations omitted; emphasis in original).



In this case, omitting to charge under *Reves* leaves the reviewing court with a record bereft of an essential jury finding. In *Yates v. Evatt*, 500 U.S. 391 (1991), this Court indicated that the absence of such a finding bars harmless-error review of a guilty verdict handed down by a conclusive-presumption-instructed jury. The inquiry into whether " 'the jury would have found it unnecessary to rely on the presumption' " is fatally incomplete, the Court held, because:

> [While such an enquiry] can tell us that the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect[, it] will not tell us whether the jury's verdict *did* rest on that evidence as well as on the presumptions. . . .

500 U.S. at 407 (emphasis supplied); *see Rose*, 478 U.S. at 580 n.8 (" 'Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue.' ") (quoting *Connecticut v. Johnson*, 460 U.S. 73, 95 n.3 (1983) (Powell, J., dissenting)).

As Justice Scalia explained concurring in *Carella*, "the problem would not be cured by an appellate court's determination that the record unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury." 491 U.S. at 269, *cited in Yates*, 500 U.S. at 406 n.10. Yet, the Second Circuit did just that: it found the facts and affirmed the conviction.

The line for which the appeals courts and state courts have been groping – awaiting this Court's guidance – should be drawn by reference to the fundamental role of

jury trial in criminal cases. The Constitution has made jury trial more than a right – Article III, Section 2, of the Constitution makes such trials mandatory absent consent of all parties and the judge. *See United States v. Singer*, 380 U.S. 24, 35-36 (1965).

Harmless-error analysis may be used when doing so does not invade the jury's province, as where the jury has avowedly or by necessary implication determined the disputed fact. For example, where the jury is wrongly instructed on a conclusive presumption, the error may be harmless if the jury found the predicate facts underlying the invalid presumption. *See Rose*, 478 U.S. at 580-81 ("In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury.") (emphasis in original).

Similarly, this Court has upheld a conviction where there is no practical difference between what the jury was instructed it must find and what the law in effect required it to find. *See Pope v. Illinois*, 481 U.S. 497, 502-03 (1987) (no practical difference on the record before the Court between "reasonable person" obscenity standard required by the first amendment, and "state community" standard used in trial court's instructions).

In this case, however, the jury's findings give no clue whether jurors thought Mr. Masotto met the *Reves* standard. Thus, there is nothing on which the harmless-error standard can rest. As this Court explained in *Sullivan*, holding that instructional error on reasonable doubt must result in reversal:



> Harmless error review looks . . . to the basis on which "the jury *actually rested* its verdict." . . . [T]o hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee. . . . The most an appellate court can conclude is that a jury *would surely have found* the petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action. . . .

113 S. Ct. at 2081-2082 (citations omitted; emphasis in original).

In short, the circuits are divided, and state courts are in disarray, on an issue that is central to the division of functions between the trial jury and the reviewing court. The issue merits plenary consideration on certiorari.

Respectfully submitted,

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## APPENDIX

Table of Contents

**UNITED STATES of America, Appellee,**

**v.**

**Thomas MASOTTO, Defendant-Appellant.**

**No. 38, Docket 94-1666.**

United States Court of Appeals,
Second Circuit.

Argued Sept. 20, 1995.

Decided Jan. 3, 1996.

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Alan S. Futerfas, New York City, and John L. Pollok, Hoffman & Pollok, New York City (Michael Rosen, New York, NY, of counsel), for Defendant-Appellant.

James Orenstein, Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney for the Eastern District of New York, Susan Corkery, Mark O. Wasserman, Assistant United States Attorneys, of counsel), for Appellee.

Before: OAKES, MINER and MAHONEY, Circuit Judges.

MINER, Circuit Judge:

Defendant-appellant Thomas Masotto appeals from a judgment of conviction and sentence entered in the United States District Court for the Eastern District of New York (Platt, then-Chief Judge) following a jury trial. A superseding indictment charged Masotto with racketeering in violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962(c) (count one), racketeering conspiracy in violation of RICO,

18 U.S.C. § 1962(d) (count two), conspiracy to commit arson of an FBI surveillance post in violation of 18 U.S.C. § 371 (count three), arson of the surveillance post in violation of 18 U.S.C. § 844(f) (count four), destruction of government property in violation of 18 U.S.C. § 1361 (count five), conspiracy to commit robbery between March of 1991 and June of 1992 in violation of 18 U.S.C. § 1951 (count six), robbery of an All-Pro Air Delivery Service truck (the "All-Pro truck") in violation of 18 U.S.C. § 1951 (count seven), robbery of a truck owned by Harold Levinson and Associates (the "Levinson truck") in violation of 18 U.S.C. § 1951 (count eight), conspiracy to steal from an interstate shipment in violation of 18 U.S.C. § 371 (count nine), theft from interstate shipment of telephones in violation of 18 U.S.C. § 659 (count ten), conspiracy to make extortionate extensions of credit in violation of 18 U.S.C. § 892 (count eleven), conspiracy to use extortionate means to collect extensions of credit in violation of 18 U.S.C. § 894 (count twelve), conspiracy to commit credit card fraud in violation of 18 U.S.C. § 1029(b)(2) (count thirteen), credit card fraud in violation of 18 U.S.C. § 1029(a)(2) (count fourteen), using and carrying a firearm during the robbery of the All-Pro truck in violation of 18 U.S.C. § 924(c)(1) (count fifteen), and using and carrying a firearm during the robbery of the Levinson truck in violation of 18 U.S.C. § 924(c)(1) (count sixteen). The jury found Masotto guilty of counts one through seven and counts nine through 15. The district court sentenced Masotto to a 248-month term of imprisonment, a 6-year term of supervised release, and a $700 special assessment.



On appeal, Masotto contends, *inter alia*, that the district court erred in its jury instructions regarding the counts charging racketeering and use of a firearm, and that there is insufficient evidence to sustain his conviction on the § 924(c) violation. For the reasons that follow, we affirm.

## BACKGROUND

In July of 1990, the Federal Bureau of Investigation ("FBI") began conducting an investigation of Masotto, who was believed to be an associate of the Gambino Organized Crime Family of La Cosa Nostra. As part of the investigation, the FBI established a surveillance post in a building located on the same street as Michael's Ristorante, a restaurant owned and operated by Masotto and located on Woodcleft Avenue in Freeport, New York. In January of 1991, Masotto discovered the FBI surveillance post and enlisted a friend, Frank Scerbo, and one of Scerbo's acquaintances, Joseph Lucas, to burn down the building containing the surveillance post. On February 22, 1991, Lucas set fire to the building.

Following the arson, according to the government, Lucas, Scerbo, and another of Masotto's friends, Peter Bertuglia, formed a crew (the "crew") with Masotto as the leader. These men formed the crew for the principal purpose of enriching themselves by committing a variety of crimes. Masotto purportedly was a member of the Gambino Family, and consequently was able to provide the crew members with the necessary "backing" to commit their crimes. He could protect the crew from competing crime organizations and could provide a network for

distributing the proceeds of the crimes. Eventually, other persons, including Michael Varone and Dave Amato, joined the crew.

In June of 1991, the crew began to hijack trucks carrying commercial goods. On June 18, 1991, Lucas and other crew members stole a truck containing approximately 150 cases of telephones. Masotto allegedly helped the crew store the truck and sell the telephones. In addition, Masotto personally received some of the stolen telephones as well as proceeds from their sale. On July 23, 1991, the crew hijacked the All-Pro truck containing a shipment of yarn. During the course of the robbery, Lucas and Amato carried guns, and Amato used a gun to force the driver from the truck. On October 22, 1991, the crew hijacked the Levinson truck containing a load of cigarettes. The government contended that Masotto was aware that the crew members were using guns during the robberies. The crew planned and executed additional truck hijackings and robberies in 1991 and 1992. In addition to these crimes, the crew engaged in a variety of other criminal activities.

In June of 1992, Varone, Lucas, and other members of the crew were arrested after an investigation by the Suffolk County District Attorney's Office. Following their arrests, Varone, Lucas, Scerbo, and Bertuglia agreed to cooperate with the government in its investigation of Masotto.

In December of 1992, a grand jury returned an indictment against Masotto charging him with several crimes. On September 23, 1993, the superseding indictment was filed, and Masotto's trial commenced in January of 1994.



Following the completion of all testimony, the district court held a conference pursuant to Rule 30 of the Federal Rules of Criminal Procedure to discuss the proposed jury instructions. Thereafter, on February 22, 1994, the court instructed the jury. Masotto objected to the court's instruction on the elements of the RICO offenses charged in counts one and two of the indictment because the instruction did not contain language from the Supreme Court's decision in *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). Masotto also objected to the district court's instruction on count 15, which allowed the jury to convict Masotto of using and carrying a firearm either under an aiding and abetting theory of liability or under a *Pinkerton* theory of liability. *See Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

The jury returned its verdict on February 28, 1994. This appeal followed the imposition of the sentence.

## DISCUSSION

### *I. Jury Instruction on the Elements of RICO*

Masotto contends that the district court erroneously instructed the jury with respect to counts one and two of the indictment relating to the RICO violations. Masotto contends that the jury instruction on the elements of RICO was erroneous because it failed to include the "operation or management" language from the Supreme Court's decision in *Reves*. The government, however, claims that Masotto has waived this contention because

he did not object properly to the district court's instruction at trial.

*A. Preservation of Objection*

Federal Rule of Criminal Procedure 30 provides in pertinent part: "No party may assign as error any portion of the [jury] charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." The objection "must direct the trial court's attention to the contention that is to be raised on appeal." *United States v. Scarpa*, 913 F.2d 993, 1020 (2d Cir.1990) (quotation omitted). The purpose of this provision is to provide the trial court with an opportunity to correct any error in the jury instructions before the jury begins deliberating. 2 Charles A. Wright, *Federal Practice and Procedure* § 484, at 698 (1982).

In the present case, the record indicates that Masotto repeatedly requested that the district court include the Reves language in its jury instruction on the elements of RICO and objected when the court failed to include the *Reves'* "operation or management" language in its instruction.[1] Request number 11 of Masotto's proposed

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[1] The district court's instruction provided in relevant part:

> [W]hen the statute requires that the affairs of the enterprise be participated in or conducted through a pattern of racketeering activity it requires the government to prove that there was a meaningful connection between the unlawful or racketeering acts of the defendant and the affairs of the enterprise. That is to say, the government is required to prove that the



jury instructions contained the "operation or management" language of *Reves*.[2] In addition, at the Rule 30 Conference, Masotto's counsel mentioned the *Reves* decision when discussing the proposed jury instruction relating to the elements of RICO. Masotto's counsel stated that "when you are going into defining how those elements [are] to be established or not established, then I guess there is the best place to put the law as recited by the Supreme Court in the *Reves* case." While the court was reviewing the government's proposed instruction on the elements of RICO, Masotto's counsel asserted that "there is no language in there . . . from the *Reves* [case]" and requested that the court adopt the language contained in request number 11 of his proposed instructions. Finally, after the court instructed the jury, Masotto's counsel stated:

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> unlawful racketeering act in some way related to the activities of the enterprise or that the defendant was able to commit the acts solely by virtue of his position or involvement in the enterprise.

[2] Request number 11 of Masotto's proposed instructions provided:

> The government must prove that the defendant conducted, or participated in, the affairs of the enterprise by *participating in the operations and management of the enterprise itself*. Therefore, the government must prove beyond a reasonable doubt, that the pattern of racketeering activity committed by the defendant, if any, concerned or related to the day to day operations or management of an existing enterprise. (emphasis added).

> We had requested an instruction based on the Reeve's [sic] decision. I didn't hear any language on – my understanding is that your Honor ruled on that and decided not to include that language. . . . We might have had it under our first set of requests to your Honor's instructions under Reeve's [sic], talking about that decision, the extent to which an individual must participate. That's what the Reeve's [sic] decision was about.

Although Masotto repeatedly objected to the district court's instruction on the grounds that it did not contain language from *Reves*, he never specified that he objected to the absence of the "operation or management" language of *Reves*. Nevertheless, Masotto's reference to his proposed instruction containing the *Reves* "operation or management" language, combined with his constant reference to the *Reves* case, were sufficient to direct the district court to his contention. Therefore, we believe that Masotto properly preserved his objection. Accordingly, we address Masotto's claim that the district court's jury instruction was erroneous.

*B. Merits of Objection to RICO Instruction*

We review a district court's jury instruction *de novo*. *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir.1994). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id*. An erroneous instruction requires a new trial unless the error is harmless. *Id*.

Under 18 U.S.C. § 1962(c), it is unlawful "for any person employed by or associated with any enterprise



engaged in, or the activities of which affect, interstate or foreign commerce, *to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs* through a pattern of racketeering activity or collection of unlawful debt." (emphasis added). Masotto contends that in light of *Reves*, the district court's jury instruction does not enunciate properly the language of § 1962(c).

In *Reves*, the Supreme Court examined § 1962(c) and adopted an "operation or management" test to determine whether a defendant had a sufficient connection to an enterprise to warrant imposing liability. *See* 507 U.S. at 178, 113 S.Ct. at 1170. The Court held that " 'to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs,' § 1962(c), one must participate in the operation or management of the enterprise itself." *Id*. at 184, 113 S.Ct. at 1173. The Court explained that under the "operation or management" test, a defendant must have "some part in directing the enterprise's affairs." *Id*. at 178, 113 S.Ct. at 1170. In addition, the Court stated that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." *Id*. at 184, 113 S.Ct. at 1173. However, the Court declined to determine "how far § 1962(c) extends down the ladder of operation." *Id*. at 184 n. 9, 113 S.Ct. at 1173 n. 9.

We agree with Masotto that the district court's instruction did not comport with the requirements of the statute as interpreted in *Reves*. The district court's instruction addressed § 1962(c)'s provision that a defendant "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" as requiring "the

government to prove that there was a meaningful connection between the unlawful or racketeering acts of the defendant and the affairs of the enterprise." The instruction required the government to prove only that the racketeering act was "in some way related to the activities of the enterprise" or that the defendant was enabled to commit the acts only by reason of his involvement or position in the enterprise. The language of the instruction does not include the *Reves* "operation or management" test because the district court failed to explain that the defendant must participate in the "operation or management" of the enterprise. Therefore, the instruction given by the district court was erroneous.

### C. *Harmless Error*

Although the district court erred in instructing the jury, that error does not necessarily require a reversal. "[E]rrors that do not affect the substantial rights of the defendant are harmless and do not compel the reversal of a criminal conviction." *United States v. Mussaleen*, 35 F.3d 692, 695 (2d Cir.1994); *see also* Fed.R.Crim.P. 52(a). An error is deemed harmless if we are convinced that the error did not influence the jury's verdict. *Mussaleen*, 35 F.3d at 695.

In the present case, the district court's failure to instruct the jury that Masotto must have been involved in the "operation or management" of the enterprise could not have influenced the jury's verdict on the RICO violations. The government's contention at trial was that Masotto was the leader of the crew. As Masotto's counsel stated, under the government's theory, "the crux of the



entire case" was whether Masotto was "a leader and associated with the enterprise and sent other people to do these things, these [criminal] acts." Indeed, the evidence at trial indicated that Masotto's only role within the crew was that of a leader. Therefore, the jury only could have found that Masotto either was the leader of the crew or was not a crew member at all. Consequently, the district court's failure to instruct the jury that it must find Masotto to have been involved in the "operation or management" of the crew could not have affected the jury's verdict, because the jury only could have found Masotto guilty based upon his leadership and management of the crew. Accordingly, the district court's error was harmless and does not require reversal.

## II. *Jury Instruction on 18 U.S.C. § 924(c)*

Masotto contends that the district court erred in instructing the jury on count 15, which charged Masotto with using a firearm in connection with the All-Pro truck robbery in violation of 18 U.S.C. § 924(c).[3] The district court instructed the jury that it could find Masotto guilty of violating § 924(c) either under an aiding and abetting theory of liability or under a *Pinkerton* theory of liability.

### A. *Pinkerton Instruction*

Under the *Pinkerton* theory of liability, a conspirator "can be held responsible for the substantive crimes

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[3] Under § 924(c), whoever uses or carries a firearm in relation to a crime of violence must be sentenced to a five-year term of imprisonment, consecutive to the punishment imposed for the violent crime.

committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if he did not himself participate in the substantive crimes." *United States v. Romero*, 897 F.2d 47, 51 (2d Cir.1990) (quotation omitted), *cert. denied*, 498 U.S. 1092, 111 S.Ct. 975, 112 L.Ed.2d 1060 (1991). The district court instructed the jury that in order to find Masotto guilty of violating § 924(c) under the *Pinkerton* theory, it must find, *inter alia*, that Masotto was guilty of the conspiracy to commit robbery charged in count six, and that the use of a firearm was reasonably foreseeable and in furtherance of that conspiracy.

Masotto contends that the *Pinkerton* instruction was inappropriate in light of this court's decision in *United States v. Medina*, 32 F.3d 40 (2d Cir.1994). In *Medina*, we held that a jury must find that the defendant "performed some act that directly facilitated or encouraged the use or carrying of a firearm" in order to convict under § 924(c). *Id.* at 45. Masotto contends that because the district court's *Pinkerton* instruction did not require a finding that Masotto "facilitated or encouraged the use or carrying of a firearm," the *Pinkerton* instruction should not have been given in connection with § 924(c). We disagree.

It is well-settled in this Circuit that a jury may be instructed on the *Pinkerton* theory of liability in connection with a charged violation of § 924(c). *See Romero*, 897 F.2d at 51 (upholding § 924(c) conviction under *Pinkerton* theory); *United States v. Bruno*, 873 F.2d 555, 560 (2d Cir.) (same), *cert. denied*, 493 U.S. 840, 110 S.Ct. 125, 107 L.Ed.2d 86 (1989). Other circuits are in agreement. *See, e.g., United States v. Jackson*, 65 F.3d 631 (7th Cir.1995)



(upholding § 924(c) conviction under *Pinkerton* theory); *United States v. Dean*, 59 F.3d 1479 (5th Cir.1995) (same); *United States v. Resko*, 3 F.3d 684 (3d Cir.1993) (finding evidence sufficient to uphold § 924(c) conviction under *Pinkerton* theory); *United States v. Cummings*, 937 F.2d 941 (4th Cir.) (holding that co-conspirator's § 924(c) violation can be imputed to other members under *Pinkerton* theory), *cert. denied*, 502 U.S. 948, 112 S.Ct. 395, 116 L.Ed.2d 345 (1991).

Our holding in *Medina* does not affect this court's precedent that a *Pinkerton* instruction may be given as an alternative theory of liability under § 924(c). In *Medina*, we addressed the question of whether there was sufficient evidence to support a § 924(c) conviction under an aiding and abetting theory. We held that, in order for a defendant to be convicted under § 924(c) pursuant to an aiding and abetting theory, the defendant must have "facilitated or encouraged the use or carrying of a firearm." *Medina*, 32 F.3d at 45. However, we were not there concerned with a *Pinkerton* instruction and our holding therefore was limited to an aiding and abetting theory of liability. Thus, *Medina* does not affect the applicability of a *Pinkerton* instruction to a § 924(c) conviction.[4] Accordingly, we hold that the district court did not err by instructing the jury on a *Pinkerton* theory of liability in connection with the § 924(c) violation.

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[4] In an opinion filed after *Medina*, we upheld a § 924(c) conviction where the district court instructed the jury on both an aiding and abetting and a *Pinkerton* theory of liability. *United States v. Thomas*, 34 F.3d 44, 50 (2d Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995).

*B. Aiding and Abetting Instruction*

Masotto also claims on this appeal that the district court erroneously instructed the jury on the theory of aiding and abetting with respect to the § 924(c) violation. Masotto contends that the instruction was erroneous because it allowed the jury to find him guilty based on his "mere knowledge" that members of the crew might use firearms without proof that he "performed some act that directly facilitated or encouraged the use or carrying of a firearm." *Medina*, 32 F.3d at 45.

Under an aiding and abetting theory of liability, any person who "aids, abets, counsels, commands, induces or procures" the commission of a crime is punished as a principal. 18 U.S.C. § 2(a). Under the law of this Circuit, a defendant "cannot be convicted as an aider and abettor under § 924(c) merely because he knew that a firearm would be used or carried." *Medina*, 32 F.3d at 45. Instead, the defendant must have "performed some act that directly facilitated or encouraged the use or carrying of a firearm." *Id.*

We believe that the district court's instruction on the aiding and abetting theory required the jury to find more than that Masotto had "mere knowledge" that members of the crew might use firearms. In its general instruction on aiding and abetting, the court instructed the jury that it could not convict Masotto as an aider and abettor of any crime unless it found, *inter alia*, that "every element of the offense as defined in these instructions was committed by some person or persons and that *the defendant participated in its commission.*" (emphasis added). Later, when instructing the jury on the elements of § 924(c), the



court instructed the jury that it could convict Masotto only if it found, *inter alia*, that he "carried or used a firearm, or aided and abetted the use of a firearm." The court then reiterated its general instruction on aiding and abetting, instructing the jury that it must find that Masotto "aided and abetted others in using and carrying firearms during the course of the crimes charged." These instructions clearly directed the jury that it could not convict Masotto unless it found that he participated in the use and carrying of a firearm. Accordingly, the district court did not err in instructing the jury on the elements of aiding and abetting the § 924(c) offense.

*III. Sufficiency of the Evidence for § 924(c) Conviction*

Masotto claims that there was insufficient evidence to sustain his conviction under § 924(c). When the jury is properly instructed on two alternative theories of liability, as here, we must affirm when the evidence is sufficient under either of the theories. *See Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) (requiring affirmance where evidence is sufficient under one of the alternative bases for conviction); *see also United States v. Washington*, 48 F.3d 73, 80 (2d Cir.) (affirming conviction based upon finding that evidence was sufficient under one of two alternative theories), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2596, 132 L.Ed.2d 843 (1995). Because we find that the evidence was sufficient under the *Pinkerton* theory of liability, we affirm Masotto's § 924(c) conviction.

A criminal defendant challenging the sufficiency of the evidence underlying his conviction bears a heavy

burden. *United States v. Gelzer*, 50 F.3d 1133, 1142 (2d Cir.1995). "[A] conviction must be upheld if, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Tejada*, 956 F.2d 1256, 1265 (2d Cir.) (internal quotations omitted), *cert. denied*, 506 U.S. 920, 113 S.Ct. 334, 121 L.Ed.2d 252 (1992). On review, "we must credit every inference that could have been drawn in the government's favor." *Id.* (quotation omitted).

In order to convict under a *Pinkerton* theory of liability, the jury must first find that the defendant was a member of a conspiracy. *See United States v. Harwood*, 998 F.2d 91, 100 (2d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 893, 127 L.Ed.2d 86 (1994). The essential element of a conspiracy is an agreement to accomplish an unlawful act. *United States v. Wardy*, 777 F.2d 101, 107 (2d Cir.1985), *cert. denied*, 475 U.S. 1053, 106 S.Ct. 1280, 89 L.Ed.2d 587 (1986). A jury may infer the existence of a conspiracy through circumstantial evidence, which only needs to demonstrate a tacit understanding between the conspirators to carry out an unlawful act. *Id.* Under the *Pinkerton* theory, a conspirator "can be held responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if he did not himself participate in the substantive crimes." *Romero*, 897 F.2d at 51 (quotation omitted). Whether a particular substantive crime is foreseeable and in furtherance of the conspiracy is a question of fact to be decided by the jury. *Id.*



In the present case, there was ample evidence for the jury to conclude that Masotto was a member of the conspiracy to hijack trucks, as alleged in count six of the indictment. At trial, Lucas, a crew member, testified that he told Masotto, Scerbo, and Bertuglia that he wished to steal trucks from Kennedy Airport, but that he "wanted to make sure [he] didn't step on anybody's toes, any other organized crime people over there." Lucas hoped that Masotto would provide him with the necessary protection. Lucas testified that Masotto responded, "[D]on't you worry about it . . . just do things the right way." Scerbo, another member of the crew, testified that Masotto agreed to assist Lucas in the plan to steal trucks by storing and selling the merchandise contained in the stolen trucks. Lucas and Scerbo testified that Masotto then instructed Bertuglia, another crew member, to give Lucas the keys and alarm code to a local car wash that Masotto and Bertuglia controlled, so that Lucas would have a place to bring the stolen trucks. The record indicates that the crew proceeded to commit several truck robberies and that Masotto shared in the proceeds of some of these robberies. Based on these facts, a reasonable jury could have found that Masotto was part of the conspiracy to commit robbery.

There also was sufficient evidence for the jury to find that a member of this conspiracy violated § 924(c) by carrying and using a firearm in connection with a violent crime. Lucas testified that both he and another crew member, Dave Amato, carried guns when they hijacked the All-Pro truck and that Amato used a gun to force the

driver from the truck.[5] The evidence also was sufficient to support a finding that the use and carrying of a firearm was foreseeable to Masotto, based on Lucas' testimony that Masotto knew that crew members carried guns during the truck robberies. Finally, because the guns were used to carry out the truck robberies, the jury could have found that the guns were used in furtherance of the conspiracy to commit robbery. Accordingly, we believe that there was sufficient evidence for a reasonable jury to convict Masotto under § 924(c) based on the *Pinkerton* theory of liability.[6]

We have considered Masotto's remaining contentions and find them all to be without merit.

## CONCLUSION

In view of the foregoing, we affirm the judgment of the district court.

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[5] Although the district court did not instruct the jury that "use" of a firearm requires a finding that the defendant "actively employed" a firearm, the evidence establishes that crew members actively employed firearms during a violent crime. *See Bailey v. United States*, ___ U.S. ___, ___, 116 S.Ct. 501, 509, 133 L.Ed.2d 472 (1995) (holding that the word "use" in § 924(c) requires the government to show "active employment" of a firearm). Amato's use of a firearm to force the truck driver out of the truck constitutes active employment of a firearm.

[6] In view of our holding that there was sufficient evidence to sustain the § 924(c) conviction under the *Pinkerton* theory of liability, we do not address Masotto's contention that the evidence was insufficient under an aiding and abetting theory. *See Griffin*, 502 U.S. at 46, 112 S.Ct. at 467.

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**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**
**UNITED STATES COURT HOUSE**
**40 FOLEY SQUARE**
**NEW YORK 10007**

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of FEBRUARY one thousand nine hundred and ninety-six.

Present:

**Hon. JAMES L. OAKES**

**Hon. ROGER J. MINER**

**Hon. J. DANIEL MAHONEY**

**CIRCUIT JUDGES,**

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94-1666 USA v. Masotto

(Filed Feb. 1, 1996)

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A petition for rehearing having been filed herein by

APPELLANT THOMAS MASOTTO

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

Alan S. Futerfas, Esq.
Law Office of
Alan S. Futerfas, Esq.
22nd Floor
260 Madison Ave.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | CR 92 1341 |
| Plaintiff, | United States Courthouse Uniondale, New York |
| -against- | February 21, 1994 |
| THOMAS MASOTTO, | 9:00 o'clock a.m. |
| Defendant. | |

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE THOMAS C. PLATT
CHIEF JUDGE – E.D.N.Y., and a jury.

APPEARANCES:

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* * *

[p. 3848] i.e., aided and abetted the injury. And I reminded you in my instructions with respect to that.

Now then if you will turn to the next count, if you will, Counts 6, 7 and 8. I read to you Count 6, but I did not read to you Counts 7 and 8, although I have discussed the provisions applicable to Counts 7 and 8 with you. And I'm going to go back just for one moment to read to you at this juncture these counts since they logically appear at this point.

If you will turn to page 12, Count 7, it charges that on or about July 23, 1991, within the Eastern District of New York, the defendant Thomas Masotto, together with others, did knowingly, willfully and unlawfully obstruct, delay and affect commerce, and the movement of articles and commodities in commerce by robbery, in that the defendant Thomas Masotto, together with others, did unlawfully take and obtain property in the possession and control of All-Pro Air Delivery Services, All-Pro, in the presence of a truck driver employed by All-Pro, against his will by means of actual and threatened force, violence and fear of immediate and future injury, to wit: the threatened use of a firearm.

Count 8 charges that on or about October 22, 1991, within the Eastern District of New York, the defendant Thomas Masotto, together with others, did knowingly, willfully and unlawfully obstruct, delay, and affect

* * *



[p. 3853] shipment of freight and property.

That's the third of the seven essential elements, if you recall where the specific overt acts are alleged as they are here. The government must prove beyond a reasonable doubt that in the commission of the offense at least one of those overt acts in furtherance of the conspiracy. In order to establish a conspiracy offense in it, of course, you have to have the other essential elements that were enumerated in connection with the conspiracy charge.

Then turning to Counts 15 and 16, which are the using and carrying of a firearm during a crime of violence. That's the last page, page 17.

Paragraph 37. On or about July 23, 1991, within the Eastern District of New York, the defendant Thomas Masotto did knowingly and wilfully use and carry a firearm during and in relation to a crime of violence, to wit: the charge contained in Count 7, which I just read to you a moment ago. That's the robbery charge, one of the robbery charges.

Count 16. On or about October 22, 1991, within the Eastern District of New York, the defendant Thomas Masotto did knowingly and wilfully use and carry a firearm during and in relation to a crime of violence, to wit: the crime charged in Count 8, in the other robbery charge that I read [p. 3854] to you a moment ago.

The statute, Section 924(c)(1) of Title 18 is also accompanied by a violation of a statute, the aiding and abetting section and applies here during and in relation to any crime of violence for which he may be prosecuted in a

court of the United States, uses or carries a firearm, shall be guilty a crime.

You may consider Count 5 which charges the defendant with knowingly and wilfully using and carrying a firearm during the commission of a crime of violence only if you find beyond a reasonable doubt that the defendant is guilty of the crime charged in Count 7, the robbery of the All-Pro Air Delivery Service truck. Likewise, you may consider Count 8 which charges the defendant with unlawfully using and carrying a firearm during the course of a crime of violence only if you find beyond a reasonable doubt that the defendant is guilty as to the crime charged in Count 8, the robbery of the Levinson and Associates truck.

In order to find the defendant guilty of the crimes charged in Counts 15 and 16, you must find that the government proved beyond a reasonable doubt the following:

First, with respect to Count 15, that on or about July 23, 1991, the defendant carried or used a firearm, or aided and abetted the use of a firearm.

Second, that the defendant had knowledge that what [p. 3855] he was using or carrying was in fact a firearm.

And Third, that the defendant used or carried a firearm during the commission of a crime of violence as charged in Count 7.

Similarly with respect to Count 16, you must find that the government proved beyond a reasonable doubt:



First, that on or about October 22nd of 1991, the defendant carried or used a firearm, or aided and abetted in the use and carrying of a firearm.

Second, that the defendant had knowledge that what he was using or carrying was in fact a firearm.

And Third, that the defendant carried or used the firearm during the commission of a crime of violence as charged in Count 8.

The first element the government must prove beyond a reasonable doubt is that the defendant use or carried a firearm, or aided and abetted in the use and carrying a firearm.

Turning now to the statute from which Counts 15 and 16 are based:

A firearm is any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

In proving the first element, the government may establish that a defendant used a firearm by proving that [p. 3856] the circumstances surrounding the presence of a firearm suggest that the possessor of the firearm intended to have it available for furtherance of the particular crime or violence charged in Counts 7 and 8. It is not necessary to establish the weapon was actually fired. Furthermore, a defendant can use a firearm within the meaning of the statute without firing, brandishing, or displaying it. It is sufficient if the proof establishes that the firearm furthered the commission of a crime of violence or was an integral part of the underlying crime being committed.

Furthermore, in order to satisfy this first element, the government need not show that the defendant actually carried the firearm on his person. It is sufficient if you find that he transported or conveyed the weapon, or had possession of it in the sense that at a given time he had both the power and intention to exercise dominion or control over it.

The second element the government must prove beyond a reasonable doubt is that the defendant had knowledge that what he was carrying or using was a firearm.

An act is done knowingly if done purposely and voluntarily, as opposed to mistakenly or accidentally. In order for the government to satisfy this element, they must prove that the defendant knew what he was doing; that is using or carrying a firearm in furtherance of the conspiracy [p. 3857] to rob the truck.

The third element the government must prove beyond a reasonable doubt is that the defendant unlawfully used or carried the firearm during and in relation to a crime of violence, in this case, the crimes charged in Counts 7 and 8. You are instructed that the crimes as set out in Counts 7 and 8 are crimes of violence for purposes of Counts 15 and 16. In other words, if you have found the defendant guilty of the crime charged in Count 7, then you may consider whether the defendant is guilty or not guilty of the charge of using or carrying a firearm in furtherance of that crime.

Similarly, if you have found the defendant guilty of the crime charged in Count 8, then you may consider whether the defendant is guilty or not guilty of the



charge of using and carrying a firearm in furtherance of crime.

The indictment charges that the defendant carried and used firearms on or about July 23, 1991, Count 15, and on or about October 22, 1991 in Count 16. I charge you that to convict the defendant of Count 15, you must unanimously agree that the defendant carried or used a firearm in connection with the crime charged in Count 7. Likewise, I charge you that to convict the defendant of Count 16, you must also unanimously agree that the defendant carried or used a firearm in connection with the crime charged in Count [p. 3858] 8.

In Counts 15 and 16 the defendant is also charged with aiding and abetting. In this regard, I instruct you that it is not necessary for the government to show that the defendant performed all of the actions necessary to establish the crimes that he is charged with. Rather, if you find that the defendant aided and abetted others in using and carrying firearms during the course of the crimes charged in Counts 15 and 16, then that satisfies the other elements with respect to them, and then he is guilty as if he were the only person responsible for committing the unlawful act or acts.

Now, if you will recall, that Count 6 on page 11 charge the defendant with conspiracy to commit robbery between June 1991 and June 1992. Two of those robberies are encompassed in Count 7 and Count 8, which just relate to Counts 15 and 16. You recall I said two moments ago you may not find the defendant guilty of Counts 15 and 16 unless you have found him guilty in the first instance as to Count 15, Count 7. The second case, Count

16, on Count 8 as a predicate of the commission of carrying or using a gun to commit a robbery.

Count 6, as I say, charges a conspiracy to commit robbery. The defendant may also be liable for the crimes charged in Counts 15 and 16 on what I called an alternative [p. 3859] theory sometime ago with respect to other events because accordingly, under the law for the crimes of his co-conspirators which are foreseeably committed in furtherance of a conspiracy.

As I just indicated, Count 6 charges the conspiracy to commit robbery in violation of Title 18, United States Code, Section 1951. In order for you to find the defendant guilty on Counts 15 or 16 based on the liability of a co-conspirator for that offense, the government must establish beyond a reasonable doubt that the defendant was part of the conspiracy charged in Count 6, that the crime charged in Count 15 or 16 was committed by one or more of the defendant's co-conspirators, and that the crime was a reasonably foreseeable result of the conspiracy charged in Count 6.

Therefore, if you find that the government has not shown beyond a reasonable doubt that the defendant himself committed acts sufficient to establish the elements of the substantive crime of using or carrying a firearm during and in relation to a crime of violence or of aiding and abetting that crime, but you find that the government has satisfied its burden of proof with respect to the crime of conspiracy to commit robbery, as charged in Count 6 of the indictment, you should consider whether the defendant may be guilty of the substantive



counts charged in Counts 15 and 16 through [p. 3860] the acts of his co-conspirators.

In order to prove the defendant guilty on Counts 15 and 16 through the acts of his co-conspirators, the government must prove beyond a reasonable doubt each of the following essential elements:

(1) that the substantive crime of using or carrying a firearm during a crime of violence was committed.

(2) that the person or persons who committed the crime were members of the conspiracy charged in Count 6.

(3) that the crime of using or carrying a firearm during the course of a crime of violence was committed pursuant to and in furtherance of the conspiracy charged in Count 6.

(4) that the defendant was a member of that conspiracy at the time the substantive crime was committed.

And (5) that the defendant could have reasonably foreseen that the substantive crime might be committed by his co-conspirator or co-conspirators.

If you find all 5 of these elements to exist beyond a reasonable doubt, then you may find the defendant guilty of the substantive crime of using or carrying a firearm during the course of a crime of violence even though he did not personally participate in the acts constituting the crime, did not aid or abet the acts, or did not have actual knowledge of it. The reasons for this rule is that a [p. 3861] conspirator is considered an agent for his co-conspirators, and the acts of one may be charged against all of the others.

If you are not satisfied as to the existence of all of these 5 elements, then you may not find the defendant guilty of Counts 15 and 16, unless the government otherwise proves beyond a reasonable doubt that the defendant personally committed, or aided and abetted the commission of, the substantive crimes contained in Count 15 and – and necessarily those involve the commission of Counts 7 and 8.

The indictment charges in many, not all of these counts, on or about, and, between, certain dates. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient if the evidence establishes beyond a reasonable doubt that an offense was committed on or about, or a date reasonably near the date alleged.

We are getting near the end.

Now knowledge or intent may not be proven directly because there is no way of fathoming or scrutinizing the operation of the human mind. But you may infer the defendant's knowledge and intent from surrounding the circumstances. You may also consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.

* * *



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

THOMAS MASOTTO,

Defendant.

----------X

CR 92-1341

United States Courthouse
Uniondale, New York

February 17, 1994
9:30 o'clock a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE THOMAS C. PLATT
UNITED STATES DISTRICT CHIEF JUDGE, and a jury.

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Proceedings recorded by mechanical stenography; transcript produced by Computer-Assisted Transcription.

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[p. 3298] we'll take them up in the order that Mr. Rosen would like us to take them up. But I'll probably charge them on this basis, but I will still not retract my simplicity method. I will tell them that they can take up the counts in any way they want to take them up.

Is there any objection to the recitation to the statute of the elements contained in the offense on 19 and the 20?

MR. FUTERFAS: Your Honor, what we object to is that there is no balance whatsoever, no balance at all, about what is –

THE COURT: Wait a minute. One, two, three, four and five. Is there any difference between the language that you submitted to me on page 12 and what they have on page 19 and 20 that I have missed somehow?

MR. FUTERFAS: Now I understand, Your Honor.



In terms of those five, no, they are the exact same as we have and we agree that that's the elements.

THE COURT: But you have a little bit more elaborate statement.

MR. FUTERFAS: For number four we do.

THE COURT: And number one.

MR. ORENSTEIN: And number three, Your Honor. And we object to their additions, Your Honor.

MR. FUTERFAS: Actually because of this new *Reves* [p. 3299] case which we discuss on page 17, actually the *Reves* case I think we can keep the elements as they are and then when you are gong into defining how those elements respect to be established or not established, then I guess there is the best place to put the law as recited by the Supreme Court in the *Reves* case. So the elements are fine.

THE COURT: So you are satisfied?

MR. FUTERFAS: Yes.

THE COURT: Let's go down to take the explanation of the first element that they set forth.

MR. FUTERFAS: Your Honor, yes. There's no balance there at all. All it says is, all the government says is "all you have to find is –" they define what it is and say all they have to find is X, Y and Z and then you are an enterprise.

On page 20 they deal with the enterprise element which is quite complex in a mere two paragraphs, page 20 and 21. Like the conspiracy, our enterprise section is

on pages 13 and 14, and we explain in our charge what an enterprise is not and what a defendant is entitled to do and still not be a part of the enterprise.

A defendant can know that there are people committing misdeeds and not be part of the enterprise. A defendant could associate with doing misdeeds and not be a part of the enterprise and also an idea that the enterprise

* * *

[p. 3312] THE COURT: The fourth element says if the defendant, that is Mr. Masotto, engaged in a pattern of racketeering activity, that he conducted or participated. That is not mere association.

MR. FUTERFAS: Well, Your Honor, the third argument–

THE COURT: You are arguing like I want to say to the jury three or four times, mere association as the defendant has proved beyond a reasonable doubt is not enough. That's what you want me to say to the jury and I will not do that.

MR. FUTERFAS: On page 20 of the Government's request they list the third element as the defendant you are considering was associated with or was employed by the enterprise. That is an element. That element should be explained–

THE COURT: It is explained in the third, fourth and fifth elements.

MR. FUTERFAS: I think the jury is entitled to know what does that third element mean?

THE COURT: Well, I will not be redundant.



MR. FUTERFAS: Very well.

The next element is pattern conducting or participating in a pattern of racketeering activity.

We object entirely to the government's charge on [p. 3313] page 22. That charge excludes all the language in *HJ, Inc.*, a Supreme Court case which defines what a pattern of racketeering is. There is no language from that Supreme Court case, there is no language in there either from the *Reves*, and the Supreme Court in *HJ* says that acts should be related to each other. I mean the government hasn't defined it at all. The acts sufficiently related to constitute a pattern. There is no definition given to the jury at all. And so we request that–

MR. ORENSTEIN: There is actually on page 60.

MR. WASSERMAN: It's request number 11. There's a five page request for instruction on participation through a pattern of racketeering activity.

MR. FUTERFAS: If I may take a moment to read this, Your Honor.

THE COURT: 60?

MR. MASSERMAN: Page 60 through 64.

MR. ORENSTEIN: While counsel is reading, Your Honor, I would point out the charge we propose is taken practically verbatim. I don't want to say it is verbatim because I don't think it is, from the charge that Judge Glasser gave in *United Sates v. Gotti* and that was litigated before the Second Circuit in *U.S. v. Locascio* and the Second Circuit approved that charge.

THE COURT: Why did you move request number 11

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No. 95-1794

In The

# Supreme Court of the United States

October Term, 1995

THOMAS MASOTTO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Thomas Masotto submits this supplemental brief in support of his petition for a writ of certiorari.

In *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996), the *en banc* Court of Appeals for the Ninth Circuit was confronted, in a habeas context, with a jury instruction analogous to the instruction held to be erroneous but harmless in *United States v. Masotto*, 73 F.3d 1233 (2d Cir. 1996).

The California state court in *Roy* erroneously gave an aiding-and-abetting instruction that failed to instruct the jury that the state was required to prove that the defendant intended to encourage or facilitate commission of the substantive offense. The state court of appeals concluded instructional error had occurred, but held the error was harmless. A divided panel of the Ninth Circuit affirmed the denial of Roy's habeas petition.

The question before the *en banc* Ninth Circuit was whether the state court's error in failing to instruct the jury properly on aiding-and-abetting intent was subject to harmless-error analysis. The Ninth Circuit, with three judges dissenting (Wallace, Hall and Rymer, JJ.), reversed. Applying Justice Scalia's concurrence in *Carella v. California*, 491 U.S. 263 (1989), it held harmless-error review of the trial court's failure to instruct the jury on the requisite intent for aiding-and-abetting liability was narrowly limited:

> [T]he omission is harmless only if review of the facts found by the jury establishes that the jury necessarily found the omitted element.

> On the record in this case, we cannot be certain the jury necessarily found beyond a reasonable doubt that Roy intended to facilitate . . . the robbery . . . , as required under *Carella* . . . before the instructional error can be treated as harmless. Although there was evidence from which a jury could have found that Roy intended to facilitate [the] robbery, there were no findings from which we could conclude the jury actually did so.

*Id.* at 867 (footnote and citations omitted).

This divergence of opinion within the Ninth Circuit – and among other circuits, as indicated in the petition for writ of certiorari Mr. Masotto has filed – suggests the opinion in *Roy* may also be the subject of a petition for writ of certiorari. The issue presented by the *Roy* decision is closely related to the question Mr. Masotto has presented in his petition.

Dated: May 21, 1996.

Respectfully submitted,

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No. 95-1794

# In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS MASOTTO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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19pp

## QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury that it could convict petitioner of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), under a *Pinkerton* or aiding and abetting theory of liability.

2. Whether the district court committed reversible error in failing to instruct the jury that, in order to convict petitioner of conducting or participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c), it must find that he participated in the operation or management of the RICO enterprise.

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 95-1794

THOMAS MASOTTO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 73 F.3d 1233.

### JURISDICTION

The judgment of the court of appeals was entered on January 3, 1996. The petition for rehearing was denied on February 1, 1996. Pet. App. 19a-20a. The petition for a writ of certiorari was filed on May 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering, in violation of

the RICO statute, 18 U.S.C. 1962(c); racketeering conspiracy, in violation of 18 U.S.C. 1962(d); conspiracy to commit arson of an FBI surveillance post, in violation of 18 U.S.C. 371; arson of the surveillance post, in violation of 18 U.S.C. 844(f); destruction of government property, in violation of 18 U.S.C. 1361; conspiracy to commit robbery, in violation of 18 U.S.C. 1951; robbery, in violation of Section 1951; conspiracy to steal from an interstate shipment, in violation of 18 U.S.C. 371; theft from an interstate shipment, in violation of 18 U.S.C. 659; conspiracy to make extortionate extensions of credit, in violation of 18 U.S.C. 892; conspiracy to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894; conspiracy to commit credit card fraud, in violation of 18 U.S.C. 1029(b)(2); credit card fraud, in violation of 18 U.S.C. 1029(a)(2); and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 248 months' imprisonment, to be followed by a six-year term of supervised release. Pet. App. 1a-2a. The court of appeals affirmed. *Id.* at 1a-18a.

1. In July 1990, the FBI began an investigation of petitioner, who was believed to be an associate of the Gambino Family of La Cosa Nostra. In the investigation, the FBI set up a surveillance post in a building located on the same street as a restaurant owned and operated by petitioner. In January 1991, petitioner became aware of the surveillance post and recruited a friend, Frank Scerbo, and one of Scerbo's acquaintances, Joseph Lucas, to burn down the building where the surveillance post was located. On February 22, 1991, Lucas set fire to the building. Pet. App. 3a.



After the arson, petitioner, Lucas, Scerbo, and Peter Bertuglia formed a "crew," as the courts below described it, to engage in criminal activity. Petitioner was the leader. As a member of the Gambino Family, petitioner had the means to provide the crew members with the necessary "backing" to commit their crimes. He could protect the crew from competing crime organizations and distribute the proceeds of crimes through established networks. Eventually, other persons joined the crew. Pet. App. 3a-4a.

In June 1991, the crew began to hijack trucks carrying commercial goods. On June 18, the crew stole a truck containing approximately 150 cases of telephones. Petitioner helped the crew store the truck and sell the telephones. In addition, he personally received some of the stolen telephones and proceeds from their sale. On July 23, the crew hijacked a truck containing a shipment of yarn. During the course of the robbery, crew members carried guns, and one of the members used a gun to force the driver from the truck. The crew planned and executed additional truck hijackings in 1991 and 1992, in addition to engaging in a variety of other criminal activities. Pet. App. 4a.

2. On appeal, petitioner contended, first, that the district court erroneously declined to instruct the jury that, in order to convict him on the RICO counts, it had to find that he participated in the operation or management of the RICO enterprise. In light of this Court's decision in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), which adopted an "operation or management" test for determining whether a person conducted or participated in the conduct of a RICO enterprise, the court of appeals agreed with petitioner's contention. Pet. App. 8a-10a. The court concluded,

however, that the instructional error was harmless. *Id.* at 10a-11a. In so doing, the court explained that, based on the evidence at trial, "the jury only could have found that [petitioner] either was the leader of the crew or was not a crew member at all. Consequently, the district court's failure to instruct the jury that it must find [petitioner] to have been involved in the 'operation or management' of the crew could not have affected the jury's verdict, because the jury only could have found [petitioner] guilty based upon his leadership and management of the crew." *Id.* at 11a.

Next, petitioner asserted that the district court incorrectly instructed the jury that it could convict him of using or carrying a firearm during and in relation to a crime of violence under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), without requiring a finding that he personally performed some act that directly facilitated or encouraged the use or carrying of the firearm. The court of appeals rejected that argument, explaining that proof of some act of facilitation or encouragement is necessary to establish liability under an aiding and abetting theory, not under a *Pinkerton* theory. Pet. App. 12a-13a. The court observed that it is "well-settled" that a jury may convict a defendant for violating 18 U.S.C. 924(c) under a *Pinkerton* theory. Pet. App. 12a.

Third, petitioner argued that the district court's instructions erroneously allowed the jury to convict him for violating Section 924(c) on an aiding and abetting theory based on his "mere knowledge" that members of the crew might use firearms. The court of appeals agreed with petitioner's statement of the applicable law—that a defendant may not be convicted as an aider and abettor under Section 924(c) merely



because he knew that a firearm would be used or carried; rather, the defendant must have performed some act that directly facilitated or encouraged the offense. Pet. App. 14a. The court concluded, however, that the district court's aiding and abetting instructions were sufficient, since they "clearly directed the jury that it could not convict [petitioner] unless it found that he participated in the use and carrying of a firearm." *Id.* at 15a.

Finally, petitioner maintained that the evidence was insufficient to support his Section 924(c) conviction. The court of appeals rejected that claim, sustaining the conviction under the *Pinkerton* theory. Pet. App. 15a. The court explained that there was ample evidence to show that petitioner was a member of the conspiracy to hijack trucks; that members of the conspiracy used or carried firearms in connection with a truck hijacking; that their use and carrying of the firearms was foreseeable by petitioner; and that the guns were employed in relation to the conspiracy to commit robbery. *Id.* at 17a-18a.[1]

## ARGUMENT

1. Petitioner's conviction for using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), rested on the evidence that his co-conspirators carried guns during the July 23, 1991, truck hijacking, that one of them used a gun to force the driver out of the truck, and that peti-

[1] In view of its holding that the evidence supported petitioner's Section 924(c) conviction under a *Pinkerton* theory, the court of appeals did not also review the sufficiency of the evidence under an aiding and abetting theory. Pet. App. 18a n.6.

tioner knew that members of the crew used guns during truck robberies. In support of the charge, the government posited two theories of criminal liability: co-conspirator liability under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), and aiding and abetting. Under the *Pinkerton* theory of liability, a defendant can be held accountable for the substantive crime of a co-conspirator so long as the crime was committed in furtherance of the conspiracy and was reasonably foreseeable by the defendant. *Id.* at 647; see *United States* v. *Romero*, 897 F.2d 47, 51 (2d Cir.), cert. denied, 497 U.S. 1010 (1990). Under the aiding and abetting theory of liability, a person may be held accountable as a principal for any crime he "aids, abets, counsels, commands, induces or procures." 18 U.S.C. 2(a). Relying on *Bailey* v. *United States*, 116 S. Ct. 501 (1995), petitioner contends (Pet. 6-13) that neither theory of liability may be employed in a Section 924(c) prosecution because, in order to be convicted under that statute, the defendant must personally use or carry the firearm.

As a preliminary matter, petitioner did not raise this claim either in the district court or the court of appeals. Rather, his only claims in the court of appeals pertaining to the Section 924(c) charge were that the district court gave defective jury instructions on the *Pinkerton* and aiding and abetting theories of liability, and that the evidence was insufficient to establish his guilt under those theories. Petitioner may not assert his claim for the first time in this Court. See *Schiro* v. *Farley*, 114 S. Ct. 783, 788 (1994); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992). Issues not raised below are deemed waived. See *Davis* v. *United States*, 495 U.S. 472, 489 (1990).



Petitioner's claim also fails on the merits. In *Bailey*, one of the defendants was arrested after police officers, who had stopped him for a traffic offense, found cocaine in the passenger compartment of the car and a loaded gun in the trunk. A second defendant kept crack cocaine in her bedroom and an unloaded gun in a locked footlocker in the bedroom closet. 116 S. Ct. at 503-504. This Court held that, on these facts, neither defendant's conviction under Section 924(c) for "us[ing]" a firearm in connection with a drug offense could be sustained. The Court explained that the word "use" in the statute contemplates "active employment" of the firearm, 116 S. Ct. at 506, such as by brandishing, displaying, firing, or bartering it, *id.* at 508; mere placement of a firearm to provide security or to embolden the defendant is not sufficient, *ibid.* The Court concluded that, since the defendants in *Bailey* did not actively employ the firearms in question, they did not "use" them within the meaning of the statute. *Id.* at 509.

*Bailey* does not mean that a Section 924(c) prosecution may not rest on a *Pinkerton* or aiding and abetting theory. The Court's sole concern in *Bailey* was to construe the meaning of the word "use" in Section 924(c), and the Court's only holding was that "use" requires "active employment." Nothing in *Bailey* casts doubt on the proposition that a defendant, either under *Pinkerton* or as an aider and abettor, may be convicted of a Section 924(c) offense based on the active use of a weapon by someone else. Indeed, there is no sound reason why the *Pinkerton* and aiding and abetting theories should be less applicable to Section 924(c) offenses than to the other diverse crimes proscribed by federal criminal law.

As petitioner concedes (Pet. 9), the courts of appeals that have addressed the issue after *Bailey* have routinely held that a defendant may be convicted under Section 924(c) on a *Pinkerton* or aiding and abetting theory. See *United States* v. *Pimentel*, 83 F.3d 55, 58-59 (2d Cir. 1996) (*Pinkerton*); *United States* v. *Fike*, 82 F.3d 1315, 1328 (5th Cir. 1996) (*Pinkerton*); *United States* v. *Spring*, 80 F.3d 1450, 1466 (10th Cir. 1996) (aiding and abetting), petition for cert. pending, No. 95-9420; *United States* v. *Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996) (both theories), petition for cert. pending, No. 95-9278; *United States* v. *Price*, 76 F.3d 526, 529 (3d Cir. 1996) (aiding and abetting); *United States* v. *Monroe*, 73 F.3d 129, 132 (7th Cir. 1995) (*Pinkerton*).

The sole contrary authority cited by petitioner is the district court decision in *United States* v. *Foreman*, 914 F. Supp. 385 (C.D. Cal. 1996). In *Foreman*, the defendant was charged with a Section 924(c) offense arising from his attempted robbery of a bank with three other men. The district court barred the government, in proving the Section 924(c) charge, from relying on the theory that the defendant aided and abetted the use or carrying of a firearm by another participant in the robbery. The court did not hold that the aiding and abetting statute never applies to Section 924(c) offenses; rather, it held that, in order to aid and abet the offense, a person must participate in the actual use or carrying of the weapon, such as by handing the weapon to an accomplice, grabbing hold of his arm while he is carrying the weapon, or counseling or commanding him to use or carry the weapon. 914 F. Supp. at 386-387. That analysis is incorrect. To qualify as an aider and abettor of a Section 924(c) offense, it is enough for a



person to know that an accomplice will use or carry a weapon during a robbery, and that such use was voluntary. See *United States* v. *Price*, 76 F.3d at 529 (upholding aiding and abetting instruction on facts similar to those in *Foreman*).[2] Those facts were established beyond a reasonable doubt in this case.[3] In any event, this Court does not grant certiorari to review a court of appeals decision merely because it conflicts with a decision of a district court. See Sup. Ct. R. 10.

2. Petitioner contends (Pet. 14-21) that the court of appeals erred in holding that the district court's failure to give an "operation or management" instruction in connection with the substantive RICO count was harmless. He argues that a court's omission of that instruction is not subject to harmless-error analysis.

This Court has held that an instructional error relating to an element of the offense is harmless if it is clear that, despite the erroneous instruction, the jury found the element in question. For example, in *Rose* v. *Clark*, 478 U.S. 570 (1986), the jury in a murder trial was incorrectly instructed that it could presume the element of malice if it found certain predicate facts. "When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Id.* at 580. The Court explained that "[i]n many cases, the predicate facts conclusively establish intent, so

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[2] In *Price*, the Third Circuit cited numerous court of appeals decisions in support of its holding. See 76 F.3d at 529.

[3] Contrary to petitioner's contention (Pet. 12), the evidence at trial showed that petitioner knew that his co-conspirators carried guns during the truck hijackings. Pet. App. 18a.

that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury." *Id.* at 580-581. The Court observed that in such circumstances "the erroneous instruction is simply superfluous," because a properly instructed jury would have reached the same verdict. *Id.* at 581. Accordingly, the Court held that harmless-error analysis should be applied to evaluate the erroneous instruction. *Id.* at 582. See also *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam) (remanding for a determination regarding harmlessness where the trial court erroneously instructed the jury that it could presume fraudulent intent and embezzlement from the existence of certain facts); *Pope* v. *Illinois*, 481 U.S. 497 (1987) (holding that erroneous instruction allowing jury to determine that allegedly obscene material had "value" under a community standard rather than a reasonable person standard was subject to harmless-error analysis).

Under the Court's approach, the district court's omission to give an "operation or management" instruction was harmless. As the court of appeals found, "the evidence at trial indicated that [petitioner's] only role within the crew was that of a leader. Therefore, the jury only could have found that [petitioner] either was the leader of the crew or was not a crew member at all." Pet. App. 11a. Accordingly, the jury could not have returned a guilty verdict on the substantive RICO count without concluding that petitioner was a leader of the crew; if it had concluded that he was not a leader, there would have been no rational basis for it to convict. There can be no doubt, therefore, that the jury would have returned the same guilty verdict even if it had



properly received an "operation and management" instruction. See, *e.g.*, *United States* v. *Perholtz*, 842 F.2d 343, 367 (D.C. Cir.) (holding that jury which was erroneously instructed on an element of the offense necessarily found the element in question beyond a reasonable doubt), cert. denied, 488 U.S. 821 (1988); *United States* v. *Webster*, 639 F.2d 174, 181 (4th Cir.) (same), cert. denied, 454 U.S. 857 (1981); *United States* v. *Jacobs*, 475 F.2d 270, 283 (2d Cir.) (same), cert. denied, 414 U.S. 821 (1973).

Petitioner's reliance (Pet. 18) on *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993), is unavailing. In that case, the Court held that the giving of a constitutionally defective reasonable-doubt instruction can never be harmless. The Court explained that, by misdescribing the burden of proof, a deficient reasonable-doubt instruction "vitiates" all the jury's factual findings. *Id.* at 2082. A reviewing court in such a case can only engage in "pure speculation" about what a properly instructed jury would have done, and to attempt to do so would improperly substitute its judgment for that of the jury. *Ibid.* The Court added that the giving of a constitutionally defective reasonable-doubt instruction amounts to a "structural" error in "the constitution of the trial mechanism" which, because its effect is unquantifiable, "def[ies] analysis by 'harmless-error' standards." *Ibid.*, quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). Other trial errors, by contrast, may be subject to harmless-error analysis if they occur "during the presentation of the case to the jury, and * * * may therefore be quantitatively assessed in the context of other evidence presented." 113 S. Ct. at 2082-2083, quoting *Fulminante*, 499 U.S. at 307-308.

This case is significantly different from *Sullivan*. In order to hold that the district court's failure to give an "operation or management" instruction was harmless, the court of appeals here did not have to engage in speculation or substitute its judgment for that of the jury; rather, it could conclusively determine from the record of the case that the jury, despite the instructional error, actually found that petitioner was a leader of the RICO enterprise. By the same token, because the effect on the verdict of the non-constitutional instructional error was measurable "in the context of other evidence presented," *Sullivan*, 113 S. Ct. at 2083, the error in this case did not rise to the level of a structural defect like the one in *Sullivan*.

Nor is petitioner helped by the Sixth and Ninth Circuit and state decisions on which he relies (Pet. 15-17 & nn. 8 & 10-11).[4] In the cases that petitioner

[4] See *Harmon* v. *Marshall*, 69 F.3d 963, 965-966 (9th Cir. 1995) (per curiam) (complete omission of elements of offense); *United States* v. *Hove*, 52 F.3d 233, 235-236 (9th Cir. 1995) (omission of scienter); *United States* v. *Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994) (conflicting instructions), cert. denied, 115 S. Ct. 1170 (1995); *United States* v. *Rogers*, 9 F.3d 1025, 1032 (2d Cir. 1993) (directed verdict on element of crime), cert. denied, 115 S. Ct. 95 (1994); *Hoover* v. *Garfield Heights Municipal Court*, 802 F.2d 168, 176-177 (6th Cir. 1986) (same), cert. denied, 480 U.S. 949 (1987); *State* v. *White*, 543 N.W.2d 725, 730-731 (Neb. 1996) (per curiam) (omission of scienter). Two other state cases cited are inapposite. See *State* v. *Brown*, 647 A.2d 17, 24 (App. Ct.) (holding instructions invalid under state constitution), certif. denied, 649 A.2d 254 (Conn. 1994); *Jarrel* v. *State*, 413 S.E.2d 710, 713 (Ga. 1992) (vacating and remanding for resentencing because evidence was sufficient to establish death sentence aggravating circumstances even though they had not been properly charged).



contends conflict with the decision here, the courts did not have the underlying factual predicate on which the court of appeals in this case rested its holding: that, despite the instructional error, the jury necessarily found facts and rendered a verdict sufficient to establish beyond a reasonable doubt the described element omitted from the instructions.

In more recent cases, both the Ninth and Sixth Circuits have indicated that the omission of an element from the jury instructions may be harmless error under that approach, *i.e.*, where the findings that the jury made under other instructions establish that it found the omitted or misdescribed element beyond a reasonable doubt. See *Roy* v. *Gomez*, 81 F.3d 863, 866-867 (9th Cir. 1996) (en banc) (omission of specific intent element from jury instructions is harmless where jury necessarily found the omitted element; distinguishing cases on which petitioner here relies); *United States* v. *McGhee*, No. 95-6323, 1996 WL 347000 (6th Cir. June 26, 1996) (affirming conviction in plain error setting, where, although trial court did not submit element of the offense to the jury, the error was harmless in light of other findings the jury necessarily made).[5]

In addition, in most of the cases cited by petitioner, the trial court failed completely to instruct the jury on one or more elements of an offense. Here, by contrast, the court properly advised the jury that, in

[5] We note that other Sixth Circuit cases are internally inconsistent on the application of harmless error inquiry to the omission of an element. Compare *United States* v. *Nelson*, 27 F.3d 199 (1994) (omitted element constituted plain error) with *United States* v. *Dotson*, 895 F.2d 263 (omitted element constituted harmless error in light of strength of evidence), cert. denied, 498 U.S. 831 (1990).

order to convict on the substantive RICO count, it must find that petitioner conducted or participated in the conduct of the enterprise. 5 C.A. App. A2659-A2660. Hence, there was no omission to instruct the jury on an element of the offense, only a failure sufficiently to elaborate on the element by giving an "operation or management" instruction.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1996

No. 95-1794

In The

# Supreme Court of the United States

October Term, 1995

THOMAS MASOTTO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## ARGUMENT

### I. Section 924(c) does not bring within its reach individuals who did not actively use a weapon.[1]

The government makes two arguments in opposition. The government first argues that "[n]othing in *Bailey* [*v. United States*, 116 S. Ct. 501 (1995)] casts doubt on the proposition that a defendant, either under *Pinkerton* or as an aider and abettor, may be convicted of a [18 U.S.C. § ] 924(c) offense based on the active use of a weapon by someone else." Opp. 7.

But *Bailey* does just that: by rejecting the so-called "fortress theory" of "constructive" knowledge and use of weapons by codefendants who had no actual knowledge of the weapons or who did not actually use the weapons,

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[1] Contrary to the government's argument, the scope of 18 U.S.C. § 924(c) liability under *Pinkerton v. United States*, 328 U.S. 640 (1946), and under an aiding and abetting theory was an issue raised below. *See United States v. Masotto*, 73 F.3d 1233, 1239-42 (2d Cir. 1996) (rejecting Masotto's arguments that *Pinkerton* instruction should not have been given in connection with § 924(c) charge, that aiding and abetting instruction improperly permitted § 924(c) conviction based on mere knowledge, and that evidence was insufficient to support § 924(c) conviction on either *Pinkerton* or aiding and abetting theories of liability); *compare United States v. Peeples*, 70 F.3d 1275, 1995 WL 703729, at **1-5 (7th Cir. 1995) (rejecting defendant's argument that evidence for § 924(c) conviction was insufficient and that government improperly relied on § 924(c) "fortress" theory of liability) *with Peeples v. United States*, 116 S. Ct. 1844 (1996) (mem.) (granting Peeples' petition for certiorari, vacating Peeples' § 924(c) conviction, and remanding to Seventh Circuit "for further consideration in light of *Bailey v. United States*, 116 S. Ct. 501 (1995)").

*Bailey* radically altered the landscape of § 924(c) "use" liability. Liability under § 924(c), the Court held, could only be predicated on *active*, not *passive*, use of a weapon.

Where a codefendant does – but the defendant does not – know about, possess, and brandish or otherwise actively employ a weapon, the defendant's "use" of the weapon could not be more "passive." Such "use" is indistinguishable from the mere "inert presence of a firearm," *Bailey*, 116 S. Ct. 508, this Court found insufficient to trigger § 924(c) liability. Imposing vicarious liability upon the defendant fails to effectuate the sentence-enhancing[2] function of § 924(c) – to punish more severely an individual who actually uses a firearm.

The government chides us for misrepresenting the record. Opp. 9 & n.3. We stand by our statement. There was evidence Mr. Masotto knew *generally* that the so-called "crew" carried guns during truck robberies, Pet. 18a, and that he knew "crew" member Lucas at times carried a gun, Pet. 4-5. There was *no evidence*, however, that Mr. Masotto knew any gun would be used in connection with the All-Pro Air Delivery Service truck hijacking that was the predicate offense in the § 924(c) count on which he was convicted. Pet. 4-5. The government has misstated the facts by suggesting[3] that Mr. Masotto knew guns would be used in the All-Pro hijacking. The Second

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[2] *See* Pet. 7 & n.3.

[3] The government is careful never to state explicitly that Mr. Masotto knew guns would be used in the *All-Pro* truck hijacking, only that he knew "crew" members had used guns during *"truck robberies."* *See* Opp. 5-6, 9 & n.3 (emphasis supplied).



Circuit's opinion states only that use of a gun at the All-Pro hijacking "was foreseeable to Masotto, based on Lucas' testimony that Masotto knew crew members carried guns during the truck robberies," Pet. 18a. Thus, the question we have presented is firmly based on the record and on the judgment and opinion below.

The government's second argument is equally unavailing. It argues "there is no sound reason" why *Pinkerton* and aiding and abetting should be less applicable to § 924(c) offenses than to "the other diverse crimes proscribed by federal criminal law." Opp. 7. But, as *Bailey* suggests, there *are* sound reasons to preclude liability when a defendant's only involvement with a weapon is attenuated.

First, as this Court has indicated, § 924(c) is a sentence enhancer,[4] not a substantive criminal offense – it increases punishment when a deadly weapon is used to commit a substantive offense.

Second, as *Bailey* suggests, the Congress *intended* § 924(c) liability to extend only to those individuals who actually used a weapon in the commission of a crime, not to those who merely knew about the weapon or to whom the weapon may have given courage or comfort. *See Bailey*, 116 S. Ct. at 507-08.

The current consensus among courts of appeals that have addressed the issue of the availability of § 924(c) *Pinkerton* and aiding and abetting liability hardly counsels against certiorari. Indeed, the circuit courts had all

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[4] *See* Pet. 7 n.3.

but unanimously accepted the "fortress" and "constructive" theories of § 924(c) liability when *Bailey* was decided. The Court has remanded many of these decisions to the circuit courts for further consideration in light of *Bailey*.[5]

## II. Omitting an offense element is a structural defect not subject to harmless-error analysis.

While *Reves v. Ernst & Young*, 507 U.S. 170, 178, 184 (1993), required a finding of management or direction of an enterprise as a precondition for conviction under 18 U.S.C. § 1962(c), the trial court permitted conviction based solely upon the government's proof that Mr. Masotto's unlawful acts "in some way related to the activities of the enterprise" or that he "was able to commit the acts solely by virtue of his position or involvement in the enterprise."

The government argues harmless-error analysis properly was applied below, notwithstanding the admitted error in the § 1962(c) instruction, because "[t]here can be no doubt . . . that the jury would have returned the same guilty verdict even if it had [been properly

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[5] *See Peeples*, 116 S. Ct. 1844; *Olds v. United States*, 116 S. Ct. 1667 (1996) (mem.); *Rhodes v. United States*, 116 S. Ct. 1562 (1996) (mem.); *Allen v. United States*, 116 S. Ct. 1411 (1996) (mem.); *Wingo v. United States*, 116 S. Ct. 1345 (1996) (mem.); *Wingo v. United States*, 116 S. Ct. 1346 (1996) (mem.); *Aikens v. United States*, 116 S. Ct. 1346 (1996) (mem.); *Smith v. United States*, 116 S. Ct. 1314 (1996) (mem.); *Hawkins v. United States*, 116 S. Ct. 1257 (1996) (mem.); *Santos v. United States*, 116 S. Ct. 1038 (1996) (mem.); *Lamb v. United States*, 116 S. Ct. 1038 (1996) (mem.); *Hines v. United States*, 116 S. Ct. 1038 (1996) (mem.).



instructed]." Opp. 10-11. This is so, the government asserts, because " 'the evidence at trial indicated that [petitioner's] only role within the crew was that of a leader. Therefore, the jury only could have found that [petitioner] either was the leader of the crew or was not a crew member at all.' " *Id.* at 10 (quoting Pet. 11a).

The government's argument, however, begs the question Mr. Masotto has raised in his Petition: while the government and the Second Circuit concluded that the evidence "indicated" Mr. Masotto was a leader of the "crew," other evidence "indicated" he was not. *See* Pet. 3-5.

Whether *in fact* Mr. Masotto was a "director" or "manager" of an enterprise in the *Reves* sense was an issue the Constitution left to the jury. Thus, while the government's argument and the Second Circuit's holding

> can tell us that the verdict could have been the same without the [instructional error], when there was evidence sufficient to support the verdict independently of the [error's] effect[, it] will not tell us whether the jury's verdict *did* rest on that evidence as well as on the [instructional error]. . . .

*Yates v. Evatt*, 500 U.S. 391, 407 (1991) (emphasis supplied).

When a trial court's jury instruction, however, unconstitutionally forecloses the jury from considering a critical factual issue, as it did here, it is a structural defect, and "[t]he most an appellate court can conclude is that a jury *would surely have found* the petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not

enough," *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993) (emphasis in original).

These are the principles the courts of appeals have struggled[6] to apply in the context of element-omitted instructions.[7]

Respectfully submitted,

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[6] While the government suggests the conflict among the circuits on the applicability of harmless-error analysis to element-omitted instructions is minimal, the circuit courts have not shared this sentiment. *See United States v. Kerley*, 838 F.2d 932, 939 (7th Cir. 1988); *Hoover v. Garfield Heights Municipal Court*, 802 F.2d 168, 176-77 (6th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987); *see generally* Pet. 15-17 & nn.8-11. The opinions even within some circuits are in conflict. *See Kerley*, 838 F.2d at 939 (noting inconsistency in Fifth Circuit); Pet. 16 at n.10 (noting inconsistency in Second Circuit).

[7] The government's purported distinction between instructions that omit an element and instructions such as the one given by the trial court below – which lowered the factual ceiling for conviction – is artificial at best. *See Kerley*, 838 F.2d at 939. For purposes of satisfying the sixth amendment, a jury erroneously instructed to convict even though it has failed to find an offense element beyond a reasonable doubt is not constitutionally different from a jury that has received no instruction on one of the offense elements. In either case, the jury's constitutional role has not been fulfilled, and the appellate courts are constitutionally barred from stepping into the jury's shoes.